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In the Supreme Court of the United States

OCTOBER TERM, 1975

**RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRON-
MENTAL PROTECTION AGENCY, CROSS-PETITIONER**

v.

E. I. duPONT DE NEMOURS AND COMPANY, ET AL.

**CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, CROSS-PETITIONER

v.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, with respect to which a petition for a writ of certiorari is now pending in No. 75-1473.¹

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-a to 34-a)² is not yet officially reported.

¹ With this cross-petition we are simultaneously filing a response to the petition in No. 75-1473 stating that the petition should be granted.

² "Pet. App." refers to the appendix to the petition in No. 75-1473.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35-a to 37-a) was entered on March 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether standards of performance promulgated under Section 306 of the Federal Water Pollution Control Act, as added in 1972, 33 U.S.C. (Supp. IV) 1316, to control effluent discharges from sources constructed after the effective date of the standards, are only "presumptively applicable" and must provide an "escape mechanism" enabling individual new sources to obtain a variance from the standards.

STATUTE AND REGULATIONS INVOLVED

Section 306 of the Federal Water Pollution Control Act, as added in 1972, 86 Stat. 854, 33 U.S.C. (Supp. IV) 1316, is set forth in Appendix A, *infra*, pp. 13-15. The regulations issued by the Administrator governing effluent discharges from new sources in the Inorganic Chemicals Manufacturing Point Source Category are set forth at 40 C.F.R. 415. Illustrative examples for two subcategories are reproduced in Appendix B, *infra*, pp. 17-22.

STATEMENT

In the Federal Water Pollution Control Act, as amended in 1972, 86 Stat. 816, *et seq.*, 33 U.S.C. (Supp. IV) 1251, *et seq.*, Congress announced its objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33

U.S.C. (Supp. IV) 1251(a). Congress set as national goals the elimination of the discharge of pollutants into navigable waters by 1985 and, where possible, the attainment of water quality by 1983 adequate to assure the protection and propagation of fish, shellfish, wildlife and to provide for recreational uses. 33 U.S.C. (Supp. IV) 1251(a)(1) and (2).

Departing from past water quality Acts, Congress decided not to rely primarily on water quality standards.³ Instead, it directed the Administrator of the Environmental Protection Agency to establish effluent limitations for categories and classes of individual point sources. 33 U.S.C. (Supp. IV) 1311. Congress also ordered the Administrator to propose and ultimately promulgate standards for the control of

³ The drawbacks of the old approach were well explained by the Eighth Circuit in *CPC International, Inc. v. Train*, 515 F.2d 1032, 1034-1035:

"The Federal Water Pollution Control Act Amendments of 1972 restructure the federal program for water pollution control. The 1972 Act was enacted against a background of frustration and ineffectiveness in controlling the quality of the nation's waters. The keystone of the pre-1972 program had been the setting of "water quality standards" for interstate navigable waters. Under that program, if wastes discharged into receiving waters reduced the quality below permissible standards, legal action could be commenced against the discharger. To establish that a given polluter had violated the federal legislation, a plaintiff had to cross a virtually unbridgeable causal gap by demonstrating that the cause of the unacceptable water quality was the effluent being discharged by the defendant. The enforcement mechanism of the prior legislation was so unwieldy that only one case had reached the courts in more than two decades."

discharges from newly constructed sources of effluents. 33 U.S.C. (Supp. IV) 1316.⁴

The questions presented by petitioners focus on the Administrator's regulations for existing sources of pollution within the inorganic chemicals manufacturing category.⁵ The question presented by this cross-petition concerns the Administrator's new source standards of performance for the same industrial category.

1. *The statutory framework.*—Section 306(a)(2), 33 U.S.C. (Supp. IV) 1316(a)(2), defines a "new source" as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." Section 306(b)(1)(A), 33 U.S.C. (Supp. IV) 1316(b)(1)(A), directs the Administrator to publish, within 90 days after passage of the Act, a list of categories of industries for which

⁴ Although the focus of the 1972 Act was thus shifted from the quality of the receiving waters to uniform limitations on the pollutants that could be discharged, water quality standards were not abandoned altogether. Section 301(b)(1)(C), 33 U.S.C. (Supp. IV) 1311(b)(1)(C), required attainment of water quality standards by 1977. Moreover, Section 302, 33 U.S.C. (Supp. IV) 1312, provided for "[w]ater quality related effluent limitations" even more stringent than the technology-based effluent limitations if the latter are not sufficient to achieve fishable and swimmable water quality.

⁵ Petitioners in this case (*du Pont II*) raise questions identical to those presented in *E. I. duPont de Nemours & Co. v. Train (duPont I)*, No. 75-978, certiorari granted, April 19, 1976. As we state in our response to the *duPont II* petition, we believe both cases should be heard and consolidated.

new source standards are to be established. The Act specifically requires that the inorganic chemicals manufacturing category be included in that list. Section 306(b)(1)(A), 33 U.S.C. (Supp. IV) 1316(b)(1)(A). The Administrator published the list, including the inorganic chemicals category, on January 16, 1973 (38 Fed. Reg. 1624).

Section 306(a)(1), 33 U.S.C. (Supp. IV) 1316(a)(1), provides that standards of performance for new sources must reflect:

the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including where practicable, a standard permitting no discharge of pollutants.

After final promulgation of new source standards, "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." Section 306(e), 33 U.S.C. (Supp. IV) 1316(e).

Section 306(d), 33 U.S.C. (Supp. IV) 1316(d), however, provides a unique degree of protection for plants that are constructed to comply with these standards of performance: no more stringent standard may be imposed on them for the ten years following their completion.⁶

⁶ Alternatively, the grace period provided by Section 306(d) extends through the period of depreciation or amortization of treatment facilities if the owner elects to take advantage of the accelerated depreciation provided by Internal Revenue Code Sections 167 and 169.

The Administrator may “distinguish among classes, types, and sizes” within the 27 general industrial categories listed in Section 306(b)(1)(A) and is to take into consideration three factors in establishing the standards: (1) the cost of achieving the effluent reduction, (2) non-water quality environmental impacts and (3) energy requirements. Section 306(b)(1)(B), 33 U.S.C. (Supp. IV) 1316(b)(1)(B).

2. *The facts of this case.*—Within the 90 days allowed by Section 509, 33 U.S.C. (Supp. IV) 1369, petitioners sought review in the court of appeals⁷ of the Administrator’s action in promulgating standards of performance for new sources in the inorganic chemicals manufacturing category pursuant to Section 306.⁸ These petitions for review of the new source standards were briefed and argued simultaneously with petitioners’ challenges to the existing source regulations.

The court of appeals held, with respect to both existing⁹ and new source regulations, that the regulations promulgated by the Administrator are “pre-

⁷ While the parties are in disagreement over the proper forum—the district courts or the courts of appeals—to review challenges to the existing source regulations, jurisdiction to review the new source regulations is agreed by all to be exclusively in the courts of appeals, pursuant to Section 509 (b)(1)(E).

⁸ The regulations were published in proposed form on October 11, 1973, 38 Fed. Reg. 28174, *et seq.* After a comment period, the regulations were promulgated in final form on March 12, 1974, 39 Fed. Reg. 9612, *et seq.*; 40 C.F.R. Part 415.

⁹ Section 301(b), 33 U.S.C. (Supp. IV) 1311(b), establishes a two-step program for existing sources. By 1977, existing sources must achieve compliance with effluent limitations based on “application of the best practicable control technology cur-

sumptively applicable," but that any source may rebut the presumption as it applies to that particular plant (Pet. App. 10-a). The court pointed out that both the Act and the EPA Administrator's regulations allow individual plants to obtain variances from the *existing* source regulations if they satisfy certain conditions. *Ibid.*¹⁰

However, neither the Act nor the regulations authorize variances for new sources. Nevertheless, the court of appeals held that its "rule of presumptive applicability applies to new sources as well as existing sources" and directed the EPA Administrator to "come forward with some limited escape mechanism for new sources" (Pet. App. 11-a).

In regard to the particular regulations applicable to more than one sub-category of effluent, the court set aside portions of the regulations dealing with "process waste water" and "process waste water pollutants,"

rently available." By 1983, existing sources must comply with effluent limitations requiring "application of the best available technology economically achievable."

¹⁰ As to the effluent limitations existing plants must meet by 1983, the Administrator may modify those limitations for a particular plant if such modification "(1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Section 301(c), 33 U.S.C. (Supp. IV) 1311(c). As to effluent limitations that must be achieved by 1977, the Administrator provided by regulation for an analogous variance. A plant owner or operator seeking a variance for 1977 must demonstrate that there are factors affecting his ability to meet the limitations that are "fundamentally different" from the factors considered by the Administrator in promulgating the regulations. 40 C.F.R. 415.62.

and with “catastrophic rainfall.” The court also set aside portions of particular regulations dealing with eleven chemical products, holding that these regulations were not adequately supported by the administrative record.

REASONS FOR GRANTING THE WRIT

In this cross-petition, we challenge only that portion of the decision which holds the new source standards to be “presumptively applicable” and requires the EPA Administrator to promulgate a variance clause for new sources.

1. The court below erred, we submit, in holding that the new source standards are only “presumptively applicable” and in requiring the Administrator to promulgate a “limited escape mechanism” or variance clause for new sources in the inorganic chemicals manufacturing industry. The court cited nothing to support such a requirement and the legislative history of the Act’s 1972 Amendments is against it. Indeed, petitioners below did not raise this point.

Believing that one of the most effective ways to reduce or eliminate pollution is through tight controls on pollution sources not yet constructed, Congress placed considerable emphasis on the need for new sources to employ the most advanced current technology. The Senate Public Works Committee considered Section 306 “among the most significant in the legislation,” explaining that (S. Rep. No. 92-414, 92d Cong., 1st Sess. 57-58 (1971) ; Leg. Hist. 1475-1476) :¹¹

¹¹ Committee Print, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. (1973) (2 vols.) (hereafter cited as Leg. Hist.).

the standards of performance for new source[s] * * * would require the achievement of the greatest degree of pollution reduction that can be achieved through the application of the best available effluent control technology * * *. Such a maximum use of available means to prevent and control water pollution is essential to the prevention of new pollution problems and the eventual attainment of the goal of no discharge.

The House Public Works Committee was similarly emphatic (H. R. Rep. No. 92-911, 92d Cong., 2d Sess. 110 (1972) ; Leg. Hist. 797) :

In section 306, the Committee recognizes two of the most significant factors in the attainment of clean water. These factors are (1) the need to preclude the construction of new sources or the modification of existing sources¹² which use less than the best available control technology for the reduction or elimination of the discharge of pollutants and (2) the recognition of the significantly lower expense of attaining a given level of effluent control in a new facility as compared to the future cost of retrofitting a facility to meet stringent water pollution control measures.¹³

If the agency's record supporting the new source standards does not reflect that the technology is available or that the Administrator fully considered cost,

¹² The extension of new source standards to modifications of existing source was deleted in conference (Leg. Hist. 173).

¹³ The Senate Committee also concluded that "maximum feasible control of new sources, at the time of their construction, is considered by the Committee to be the most effective and, in the long run, the least expensive approach to pollution control" (S. Rep. No. 92-414, *supra*, at 58; Leg. Hist. 1476).

non-water quality environmental impacts, and energy requirements, then the regulations should be remanded to the Administrator.¹⁴ But when the regulations for any given industrial category are supported by the record and reflect consideration of the statutory factors specified in Section 306(b)(1)(B), there is no reason to provide an “escape hatch” for plants not yet constructed. In the case of existing sources, a particular plant may face unique circumstances not considered by the Administrator in promulgating regulations of general applicability. For new plants, however, Congress directed the Administrator to ensure “that any new source constructed does the best that can be done in terms of performance” (Leg. Hist. 172). In other words, new sources must be built to comply with the new source standards or not built at all.¹⁵

2. Since the Court will decide the questions relating to existing sources in *duPont I* (*E. I. duPont de Ne-*

¹⁴ This is the course followed by the court below on the basis of its conclusion in several instances that the record was inadequate to support both the existing and new source regulations. The Administrator does not seek review of this aspect of the remand order.

In regard to other industrial categories, both the Eighth Circuit in *CPC International, Inc. v. Train*, 515 F.2d 1032, and the Third Circuit in *American Iron & Steel Institute v. Environmental Protection Agency*, 526 F.2d 1027, followed this approach with respect to new source standards unsupported by the record. Significantly, however, neither court suggested that the Administrator must also promulgate a variance procedure for new sources.

¹⁵ In light of the grace period provided by Section 306(d) (*supra*, p. 5), it is even more unlikely that Congress intended to provide new sources with an escape hatch as well.

mours & Co. v. Train, No. 75-978, certiorari granted April 19, 1976), it is, we submit, appropriate for the Court to decide the new source issue at the same time. If this aspect of the decision below is left standing, there will be a variance procedure for new sources in the inorganic chemicals manufacturing industry. Congress could not have intended to make variances available only to new sources in that industry, yet, as we have stated (note 14, *supra*), other courts of appeals that have reviewed new source regulations for other industries have not required the Administrator to promulgate such variance procedures.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1976.

APPENDIX A

Federal Water Pollution Control Act, 62 Stat. 1155, as amended by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, *et seq.*, 33 U.S.C. (Supp. IV) 1251, *et seq.*:

§ 1316. National standards of performance.

(a) Definitions.

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources.

(1) (A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
 paperboard, builders paper and board mills;
 meat product and rendering processing;
 dairy product processing;
 grain mills;
 canned and preserved fruits and vegetables processing;
 canned and preserved seafood processing;
 sugar processing;
 textile mills;
 cement manufacturing;
 feedlots;
 electroplating;
 organic chemicals manufacturing;
 inorganic chemicals manufacturing;
 plastic and synthetic materials manufacturing;
 soap and detergent manufacturing;
 fertilizer manufacturing;
 petroleum refining;
 iron and steel manufacturing;
 nonferrous metals manufacturing;
 phosphate manufacturing;
 steam electric powerplants;
 ferroalloy manufacturing;
 leather tanning and finishing;
 glass and asbestos manufacturing;
 rubber processing; and
 timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulga-

tion of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance.

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards.

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26 whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance.

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

APPENDIX B

40 C.F.R. Part 415:

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBPART A—ALUMINUM CHLORIDE PRODUCTION SUBCATEGORY

§ 415.10 Applicability; description of the aluminum chloride production subcategory.

The provisions of this subpart are applicable to discharges resulting from the production of aluminum chloride.

§ 415.11 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR 401 shall apply to this subpart.

§ 415.12 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that

facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available: there shall be no discharge of process waste water pollutants to navigable waters.

§ 415.13 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable: there shall be no discharge of process waste water pollutants to navigable waters.

§ 415.14 [Reserved]

§ 415.15 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart: there shall be no discharge of process waste water pollutants to navigable waters.

§ 415.16 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the aluminum chloride production subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in Part 128 of this chapter,

except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 415.15; *Provided*, That, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

SUBPART B—ALUMINUM SULFATE PRODUCTION SUBCATEGORY

§ 415.20 Applicability; description of the aluminum sulfate production subcategory.

The provisions of this subpart are applicable to discharges resulting from the production of aluminum sulfate.

§ 415.21 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR 401 shall apply to this subpart.

§ 415.22 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or

facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings, to revise these regulations.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

(a) Subject to the provisions of paragraphs (b), (c), and (d) of this section, there shall be no discharge of process waste water pollutants into navigable waters.

(b) A process waste water impoundment which is designed, constructed and operated so as to contain the precipitation from the 10 year, 24 hour rainfall event as established by the National Climatic Center, National Oceanic and Atmospheric Administration for the area in which such impoundment is located may discharge that volume of process waste water which is equivalent to the volume of precipitation that falls within the impoundment in excess of that attributable to the 10 year, 24 hour rainfall event, when such event occurs.

(c) During any calendar month there may be discharged from a process waste water impoundment either a volume of process waste water equal to the difference between the precipitation for that month that falls within the impoundment and the evaporation for that month, or, if greater, a volume of process waste water equal to the difference between the mean precipitation for that month that falls within the impoundment and the mean evaporation for that month as established by the

National Climatic Center, National Oceanic and Atmospheric Administration for the area in which such impoundment is located (or as otherwise determined if no monthly data have been established by the National Climatic Center).

(d) Any process waste water discharged pursuant to paragraph (c) of this section shall comply with each of the following requirements:

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed—
	Metric units (milligrams per liter)	
TSS.....	50	25
pH.....	Within the range 6.0 to 9.0.	
	English units (parts per million)	
TSS.....	50	25
pH.....	Within the range 6.0 to 9.0.	

§ 415.23 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

(a) Subject to the provisions of paragraph (b) of this section there shall be no discharge of process waste water pollutants into navigable waters.

(b) A process waste water impoundment which is designed, constructed, and operated so as to contain the precipitation from the 25 year, 24 hour rainfall event as established by the National Climatic Center, National Oceanic and Atmospheric Administration for the area in which such impoundment is located may discharge that volume of process waste water which is equivalent to the volume of precipitation that falls within the impoundment in excess of that attributable to the 25 year, 24 hour rainfall event, when such event occurs.

§ 415.24 [Reserved]

§ 415.25 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

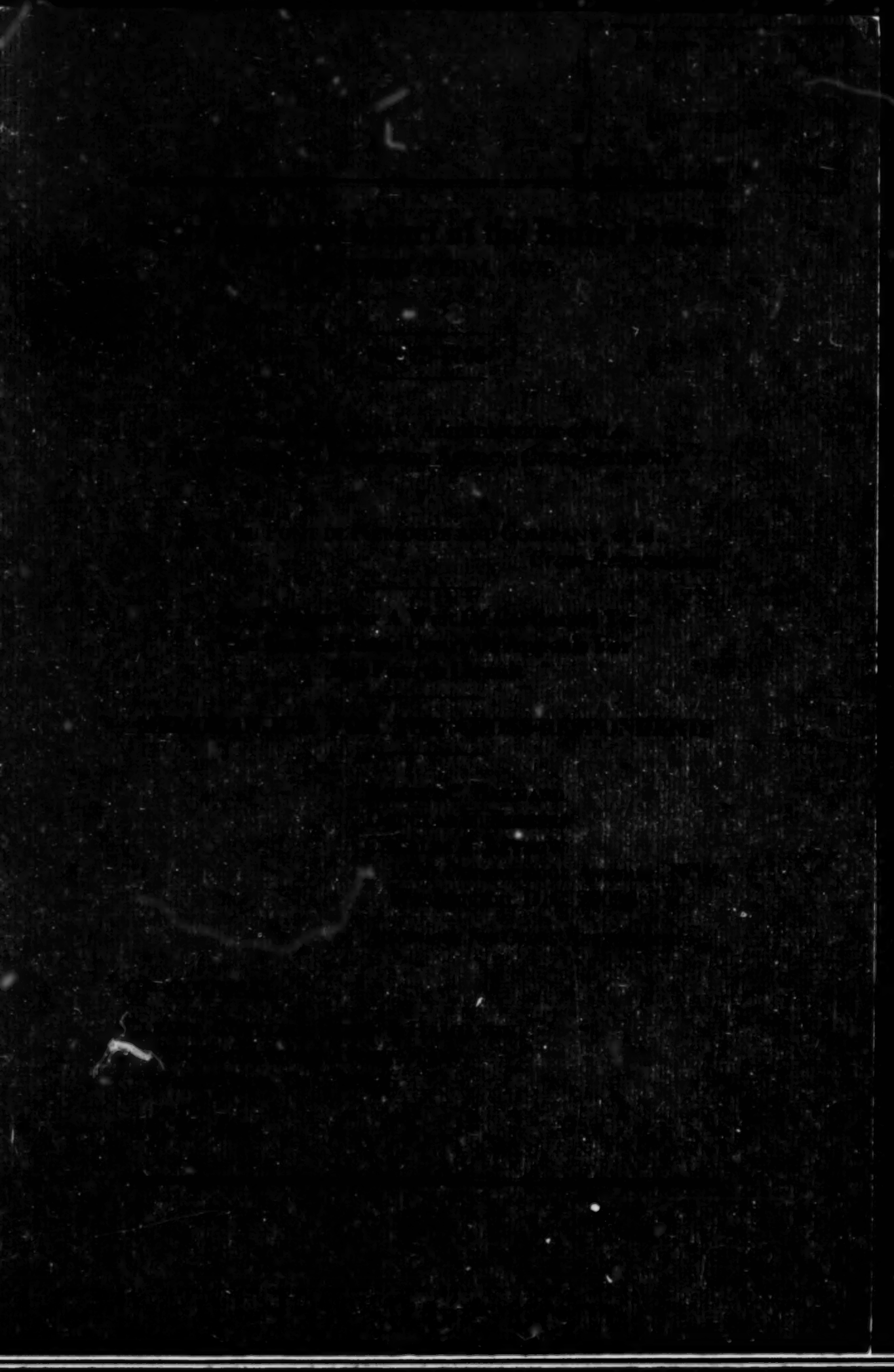
(a) Subject to the provisions of paragraph (b) of this section there shall be no discharge of process waste water pollutants into navigable waters.

(b) A process waste water impoundment which is designed, constructed, and operated so as to contain the precipitation from the 25 year, 24 hour rainfall event as established by the National Climatic Center, National Oceanic and Atmospheric Administration for the area in which such impoundment is located may discharge that volume of process waste water which is equivalent to the volume of precipitation that falls within the impoundment in excess of that attributable to the 25 year, 24 hour rainfall event, when such event occurs.

§ 415.26 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the act for a source within the aluminum sulfate production subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in Part 128 of this chapter, except that, for the purpose of this section, § 128.133 of this chapter shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 415.25: *Provided*, That, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.



In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1705

RUSSELL E. TRAIN, Administrator of the
Environmental Protection Agency, *Cross-Petitioner*

v.

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Cross-Respondents.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Fourth Circuit**

MEMORANDUM FOR THE CROSS-RESPONDENTS

Cross-respondents agree that this Court should grant the cross-petition for a writ of certiorari in this case.

This cross-petition (No. 75-1705) and the petition (No. 75-1473) relate to the Fourth Circuit's decision in *E. I. du Pont de Nemours & Co. v. Train*, ____ F.2d ____, 8 E.R.C. 1718 (4th Cir., decided March 10, 1976) ("*du Pont II*"). The questions presented in the petition in No. 75-1473 pertain to the effluent regulations issued for existing sources by the Environmental Protection Agency ("EPA") under the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.* ("the Act").¹ The

¹ The questions presented in the petition in No. 75-1473 are identical to those raised in *E. I. du Pont de Nemours & Co. v. Train*, No. 75-978, petition for a writ of certiorari granted 44 U.S.L.W. 3592 (U.S., April 19, 1976) ("*du Pont I*"). On April 13, 1976, concurrently with the filing of the petition in No. 75-1473 (*du Pont II*), the petitioners in *du Pont I* and *du Pont II* (cross-respondents here) filed a motion to consolidate the cases. The Solicitor General has also supported consolidation of the cases. See Memorandum For Respondent in No. 75-1473, at 1.

cross-petition would add a single question respecting EPA's standards for new sources, *i.e.*, whether such standards should contain an "escape mechanism" enabling a new source to obtain, upon an appropriate factual showing, a discharge permit different from such a standard.²

The question posed by the cross-petition is properly presented on this case. It would seem appropriate to decide the new-source issue concurrently with the existing-source questions.

Respectfully submitted,

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MAY 27, 1976

² On the merits, the cross-respondent companies submit that the court of appeals was correct in ruling that EPA's new source standards should provide an "escape mechanism". Provisions of this Act, as well as judicial doctrines of construction for statutes providing agencies with rulemaking authority, support a "safety valve procedure" linked to special facts in particular cases. See, *e.g.*, *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972); *WAIT Radio v. Federal Communications Commission*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (1969).